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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, et al, Petitioners, vs. UTAH DIVISION OF OIL, GAS & MINING, Respondents, ALTON COAL DEVELOPMENT, LLC, and KANE COUNTY, UTAH Respondent/Intervenors.	**RESPONDENT ALTON COAL DEVELOPMENT, LLC'S MOTION AND MEMORANDUM IN SUPPORT OF PARTIAL SUMMARY JUDGMENT** Docket No. 2009-005 Cause No. C/025/0005

Alton Coal Development, LLC ("**Alton**" or "**ACD**"), the permittee of Mine Permit No. C/025/0005 ("**Permit**"), through its attorneys, and pursuant to Utah Administrative Code R641-105-300 and Utah Code § 63G-4-102(4)(b), hereby moves for partial summary judgment on the

claims raised by petitioners Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, Natural Resources Defense Council, and National Park Conservation Association (collectively, "**Petitioners**") in their Request for Agency Action, filed with the Board of Oil, Gas and Mining ("**Board**") on November 18, 2009.

Petitioners' Request for Agency Action disputes the Utah Division of Oil Gas and Mining's (the "**Division's or "UDOGM's"**) decision to approve a permit application filed by Alton to conduct a surface coal mining operation in the Alton coal field (the "**Application**"). Petitioners have set forth objections that do not present any genuine issue of material fact, are without legal merit, and should be dismissed as a matter of law. As a result, Alton moves the Board to dismiss the following claims raised by the Petitioners: (i) that Alton failed to address road-kill issues or efforts regarding protection of the sage grouse and other wildlife in the Application; (ii) the Application's cultural/historic resource information was deficient; (iii) the Application lacks necessary information regarding alternative sources of water and water replacement; and (iv) the Application's air pollution control plan is deficient.

STATEMENT OF UNDISPUTED FACTS

1. Alton is the owner of the Coal Hollow Mine, and permittee of Mine Permit No. C/025/0005. (Permit C/025/0005. (Attached as Exhibit A, at p. 1.)

2. Alton proposes to develop to develop and operate a surface coal mine which will produce approximately 2,000,000 tons of coal annually from private lands, (the "**Coal Hollow Mining Project**"). (Permit Administrative Overview, attached as Exhibit B at 1.)

3. The Alton permit area comprises approximately 635.64 acres in Sections 19, 20, 29 and 30, Township 39 South, Range 5 West, SLM, Kane County, Utah. (Ex. A, at 1-2). No

publicly-owned surface or mineral property is involved in the project. The entire surface and mineral estate is privately-owned and leased by Alton. (Final Technical Analysis, at 11.)

4. Alton has applied to lease certain federal coal reserves pursuant to a competitive Lease by Application ("**LBA**") pending before the Bureau of Land Management ("**BLM**"). The LBA is not included within the permit area of the approved Application. (Ex. B at 1.)

5. Alton submitted the Application to the Division for approval of the permit on June 14, 2007. The Division initially deemed the Application incomplete on August 27, 2007. (Permitting Chronology, State Decision Document and Application Approval, October 15, 2009, attached as Exhibit C.)

6. Alton provided supplemental information to the Division, on January 24, 2008. Id.

7. On March 14, 2008 the Division determined the Application administratively complete. Id.

8. A period of public notification occurred from March 26, 2008 to April 16, 2008. On May 16, 2008 the public comment period ended and an informal conference was held on June 16, 2008 in Alton, Utah. Id.

9. In response to the public comment and input from other agencies, Alton provided additional information to the Division on December 22, 2008, August 17, 2009, October 8, 2009, and October 14, 2009. Id.

10. The Division approved the Application by State Decision Document and Application Approval dated October 15, 2009. This document includes a Technical Analysis dated October 15, 2009 (the "**Final TA**"), Findings as required by R645-300-131.114 dated

October 15, 2009 ("**Findings**"), Administrative Overview and Recommendations for Approval, Permitting Chronology, Proposed Permit, Location Map, Determination of Completeness, Publication Notices, the Cumulative Hydrologic Impact Assessment ("**CHIA")** dated October 15, 2009, the Applicant Violator System ("**AVS**") Recommendation dated October 15, 2009 and Insurance Certificate.

11. By letter dated October 19, 2009 the Division notified the Permittee of the Application approval. (See Letter from Division Director John R. Baza to Chris McCourt, Alton Manager, attached as Exhibit D.)

12. Petitioners filed a Request for Agency Action to appeal the approval of the Application on November 18, 2009. Proceedings before the Board commenced on December 9, 2009.

13. In June 2007, Alton submitted to the Division, its procedures for the minimization of adverse impacts to fish and wildlife, including a "Sage-Grouse Habitat Assessment and Mitigation Plan" and "Sage-Grouse Distribution and Habitat Improvement" Report. These reports were later revised in August and October, 2009 based on Division review. (See, e.g. Application at Appendix 3-5.)

14. On or about March 9, 2009, the Utah Division of Wildlife Resources ("**UDWR**") submitted comments regarding Alton's Mitigation Plan. Amongst these comments was a request that Alton address the issue of road-kill. Specifically, the UDWR requested that "a specific road-kill monitoring program be established, whereby truck drivers could maintain a log of animals hit and/or killed." (See UDWR comments by Neil Perry, attached hereto as Exhibit E).

15. On April 20, 2009, the Division sent Alton a Technical Analysis containing deficiencies. Included amongst those deficiencies was the following statement:

> Protection. The application needs to include a wildlife awareness program for the employees that include avoidance, harassment situations in transportation corridors and speed limits. For the affected areas within the Division's scope of responsibility, the awareness program needs to include measures to efficiently monitor, (truck drivers could maintain a log of animals hit and/or killed) and remove road kill by haul trucks, including but not limited necessarily limited to: mule deer, elk, sage grouse, other birds and smaller animals.

(April, 2009 Technical Analysis Deficiency List, Excerpt attached as Exhibit F.)

16. Alton Coal responded to the above deficiency by including monitoring, protection and enhancement measures in its Operation Plan, including:

- Speed limits of all vehicles will be posted at 25 mph inside the permit area;
- The safety meetings conducted on the mine site to all employees will include information regarding the awareness of important wildlife species in the area;
- The mining operator will keep log records of any road kill of deer, elk, sage-grouse and domestic livestock from coal haul and associated vehicles from the mine site to Highway 89."

(Operation Plan, Excerpts attached as Exhibit G, at 3-54.)

17. The Final TA sets forth the Division's finding that Alton's plan meets the requirements of the applicable regulations, and that the Division reached that finding in consultation with UDWR and the U.S. Fish and Wildlife Service ("USFWS"). (Final TA, at p. 96.)

18. The Final TA confirmed an express finding that Alton's plan meets the requirements of the application regulations, and the Division reached that finding in consultation with UDWR and the U.S. Fish and Wildlife Service.. 783.12 and R645-301-411. (Final TA, p. 26.)

19. The Division further finds that the "[c]oal mining and reclamation operations would not adversely affect any publicly owned park or any place included in the National Register of Historic Places. (Final TA, p. 84.) The Division also issued a finding confirming that issuance of the Permit is in compliance with the National Historic Preservation Act and implementing regulations (Findings, ¶ 6.)

20. The Panguitch National Historical District (the "**Panguitch District**"), is not within the Coal Hollow Mine permit boundaries. (Permit, at 1-2.)

21. The Panguitch District is approximately 20-30 miles from the permit site where operations will take place. (Cultural Resource Management Plan, Excerpt attached as Exhibit H, at 5.)

22. Federal Highway US 89 is a public road, maintained with public funds, with substantial public use. It is a multiple use, open access, public road owned by the United States, maintained with federal funds, constructed in a manner similar to other federal highways of the same classification and impacts from mining are not significant. Pursuant to Utah Admin. Code R641-108-204, Alton requests that the Board take official notice of this fact.

23. Alton reported its findings concerning alternative sources of water in its Application, stating that:

> Using an unlikely worst-case scenario and assuming that all springs with state appropriated waters in both Areas A and B were to cease flowing, a total replacement of approximately 52 gpm would be required. The proposed new water well located in Section 29, Township 39 South, Range 5 West will be designed to produce water at that quantity and, therefore, should be able to provide adequate replacement water in even this worst-case scenario (which is not considered likely).

(Application at 7-22 and 7-23.)

24. The Division has entered a finding determining that Alton's hydrologic resource information meets the requirements of the Coal Mining Rules, 30 C.F.R. § 701.5, 784.4; R645-100-200.301-724. (Final TA at 76.)

25. Alton included a Fugitive Dust Control Plan in its Application, which specifies the use of EPA Method 9 in its monitoring program. (Application, at Appx. 4-5; Final TA at 87.)

26. On October 13, 2009 a representative of the Division, Priscilla Burton, sent an email to Jon Black from the Utah Department of Air Quality ("**DAQ**") in which she stated that:

> "Method 9 is being proposed for monitoring of the fugitive dust control plan. [The Division] does not have the expertise to evaluate the use of method 9. Your comment that EPA Method 9 is occasionally used for fugitive control monitoring of sand and gravel operations has been helpful. I am hopeful that DOGM will coordinate the permitting and compliance of this control plan with DAQ in the future."

(October 13, 2009, E-mail attached as Exhibit I.)

27. The Division issued a finding confirming that Alton submitted a Fugitive Dust Control Plan to the Division and recommending that the Utah DAQ evaluate this plan and EPA Method 9 prior to issuance of the air quality permit for the Coal Hollow Mine. (Final TA at pp. 86-87.)

28. The permit is conditioned upon Alton's receipt of an Air Quality Approval Order from DAQ prior to conducting surface mining. (Permit, Attachment A, Special Conditions.)

29. In the March 26, 2009 Technical Analysis, the Division identified issues concerning the Coal Hollow Mining Project's effect on "night sky" clarity and seeking additional information (March 26, 2009 Technical Analysis at 83.) Alton responded to "night sky" issues identified by the Division in a memorandum provided to the Division in June, 2009, in which

Alton demonstrated that the Division did not have the authority to require information on "night sky" issues. (See Exhibit 3 to June 15, 2009 Initial Response to Division Technical Analysis.)

STANDARD FOR SUMMARY JUDGMENT

In a formal adjudication under the Utah Administrative Procedures Act ("UAPA"), the presiding officer(s) may dispose of a matter by summary judgment as that standard is set forth in the Utah Rules of Civil Procedure. Utah Code § 63G-4-102(4)(b) (LexisNexis 2009); see Utah Admin. Code R641-100-500 (2009) (reserving all powers in UAPA to the Board). Summary judgment shall be rendered when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). A party opposing summary judgment may not rest on mere allegations or denials, but must provide affidavits or other evidence setting forth specific facts showing that there is a genuine issue to be resolved at trial. Id. at 56(e).

ARGUMENT

I. THE BOARD SHOULD DISMISS PETITIONERS' CLAIMS THAT ALTON FAILED TO PROPERLY ADDRESS ROAD-KILL ISSUES OR THE PROTECTION OF SAGE GROUSE AND OTHER WILDLIFE IN THE APPLICATION.

The Board should dismiss Petitioners' claims that Alton failed to address road-kill issues or efforts to protect sage grouse and other wildlife, because Alton's application provided all of the protections and information required by the applicable statutes and regulations. Petitioners claim that Alton's permit application fails to adequately protect the local sage grouse population, in violation of Utah Admin. Code R645-301-330.[1] (Request, at 34-35.) However, Alton

[1] "Operation Plan. Each application will contain a plan for protection of vegetation, fish, and wildlife resources throughout the life of the mine." Utah Admin. Code R645-301-330.

complied with this requirement to submit "a plan for protection of vegetation, fish, and wildlife resources" by providing a Sage-Grouse Habitat Mitigation Plan (the "**Mitigation Plan**"). In all, the Mitigation Plan and its revisions total roughly 50 pages, exclusive of supporting documentation and maps. Application at Volume 2, Chapter 3, Section 333, Appendix 3-5. The Division accepted Alton's Mitigation Plan and it is a condition of the approved permit. Technical Analysis ("**TA**"), October, 15, 2009 at page 89; Permit C/025/0005, October 15, 2009, Section 18, Attachment A, Special Conditions, at ¶ 7.

Petitioners first argue that Alton's Plan was deficient because it failed to adequately "address the issue of road-kill" and therefore the Division "unlawfully approved [Alton's] permit without the information addressing road kill requested by UDWR." (Request, at p. 34.) The Petitioners allege that Alton's revised "Sage-Grouse Habitat Mitigation Plan dated October 2009 makes no mention of steps taken to monitor road kill requested by UDWR." (Request, at 34.) However, this claim is incorrect. Alton's Mitigation Plan sets forth specific measures Alton will undertake with the goal of "provid[ing] protection of the resident wildlife," which include: (i) posting speed limits of all vehicles at 25 mph inside the permit area; (ii) safety meetings conducted onsite to all employees that "include information regarding awareness of important wildlife species in the area;" and (iii) keeping "log records of any road kill of deer, elk, sage-grouse and domestic livestock from coal haul and associated vehicles from the mine site to Highway 89."[2] (Ex. G, at 3-54.) The Mitigation Plan also states that "[t]he location and operation of haul and access roads and support facilities will be placed to avoid or minimize

[2] This measure directly mirrors the UDWR's request found in its comments to the Section 333 requirements that "a specific road-kill monitoring program be established, whereby truck drivers could maintain a log of animals hit and/or killed." (See UDWR comments by Neil Perry, attached hereto as Exhibit E).

impacts on important fish and wildlife species or other species protected by state or federal law. Enhancement of such resources will be achieved, where practicable." (Ex. G, at 3-44.)

Next, the Petitioners complain that there is nothing in the record indicating that the Mitigation Plan was found sufficient by UDWR, and that "[t]he Division unlawfully approved [Alton's] permit application without first consulting with UDWR regarding ACD's revised Sage-Grouse Habitation Mitigation Plan dated October 2009." (Request, at 35.) The Division's TA confirms that the UDWR and the USFWS consulted by the Division in reaching its finding that Alton's Mitigation Plan meets the requirements of the Utah Coal Program. (TA at p. 96.) However, Petitioners misstate the consultation requirements of the Division and do not cite to any authority demonstrating that the Division must go back to the UDWR for a second consultation after UDWR has commented, or that the Division must accept UDWR's comments as binding. Instead, the regulations provide that:

> Each application will include fish and wildlife resource information for the permit area and adjacent areas . . . .
>
> The scope and level of detail for such information will be determined by the Division in consultation with state and federal agencies with responsibilities for fish and wildlife and will be sufficient to design the protection and enhancement plan required under R645-301-333.

R645-301-322, 322.100 (emphasis added); see also R645-300-112.100 ("The Division has the responsibility to approve or disapprove permits under the approved State Program.") (emphasis added). Thus, the regulations require that the level of detail for the fish and wildlife resource information is determined by the Division. In this case, the Division has properly consulted with the state and federal agencies, has determined the level of detail required and found the Application adequate to meet these requirements. See Division finding, Final TA at p. 96.

For these reasons, the Board should confirm the Division's findings and dismiss Petitioners' claims respecting alleged "inadequate protections for sage grouse."

II. THE BOARD SHOULD DISMISS PETITIONERS' CLAIMS THAT THE APPLICATION'S CULTURAL/HISTORIC RESOURCE INFORMATION WAS DEFICIENT.

The Board should dismiss Petitioners' claim that Alton's application was deficient because it did not include adequate cultural/historic resource information. The Division has specifically found the cultural resource information provided in the Application adequate to meet the requirements of R-645-301-411. (Final TA at p. 26.) Further, the Division has found that Alton's operations will not adversely affect any place included in the National Register of Historic Places. (Final TA at p. 84.) The Division also found issuance of the permit to be in compliance with the National Historic Preservation Act and implementing regulations. (Findings, ¶ 6.) Despite these findings and despite acknowledging that Alton filed a Cultural Resource Management Plan (the "**CRMP**"), Petitioners complain that the plan "provides no analysis of adjacent areas as required by the Division's regulations" and contains "no discussion of the effects of the proposed mining on the Panguitch National Historic District." (Request, at 25.) The Petitioners cite to Rule 645-301-411.140 of the Utah Administrative Code, which provides:

> Cultural and Historic Resources Information. The application will contain maps as described under R645-301-411.141 and a supporting narrative which describe the nature of cultural and historic resources listed or eligible for listing in the National Register of Historic Places and known archeological sites within the permit and adjacent areas. The description will be based on all available information, including, but not limited to, information from the State Historic Preservation Officer and from local archeological, historic, and cultural preservation agencies.

U.A.C. R645-301-411.140 (emphasis added).

Petitioners' contention is that possible truck traffic through Panguitch requires additional material to be added to the CRMP. However, Alton was not required to provide any detailed analysis of the Panguitch National Historical District (the "**Panguitch District**"), as it is not within the permit boundaries or the adjacent area. Analysis of the District under the CRMP is not a requirement of SMCRA or the Utah Coal Program. Alton developed the CRMP in response to a special request by the State Historic Preservation Office ("**SHPO**"). The only reason that Panguitch District is addressed is to comply with the National Environmental Policy Act ("**NEPA**") relating to the pending federal coal lease application. The NEPA analysis is triggered by federal actions unrelated to the mine permit on private land. Therefore, this portion of Petitioner's Request should be dismissed.

1. The Panguitch District and Highway US 89 Are Not Within the Permit Area or the Adjacent Area.

The Utah Administrative Code defines "adjacent area" as "the area outside the permit area where a resource or resources, determined according to the context in which adjacent area is used, are or reasonably could be expected to be adversely impacted by proposed coal mining and reclamation operations, including probable impacts from underground workings." U.A.C. R645-100-200 (emphasis added). This definition relates to the term "coal mining and reclamation operations" and the areas upon which operations occurs and includes "adjacent land, the use of which is incidental to any such use" including "all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities for haulage and excavation. . . ." Id. As Figure 3 of the CRMP makes clear, the Panguitch District is roughly 20-30 miles from the Coal Hollow Mine permit site where operations will take place. (Ex. H at 5.) The Panguitch District does not fall within the "adjacent area" as it would not be

impacted by mining operations or reclamation operations, nor is U.S. Highway 89 a "haul road" to gain access to the Coal Hollow Mine. This public road is not included in the mine permit, is not subject to reclamation once Alton's mining operations cease and is not included in the operator's reclamation bond. See Ex. A.

The term "surface coal mining operations" under the federal Surface Mining Control and Reclamation Act ("**SMCRA**"), 30 U.S.C. § 1291(28)(B) parallels Utah's definition of "coal mining and reclamation operations" and has been construed to exempt public highways.[3] Harman Min. Corp. v Office of Surface Min. Reclamation and Enforcement, 659 F.Supp. 806, 811 (W.D. Va. 1987). In Harman, the federal district court was called upon to consider whether certain public roads used to haul coal in West Virginia were excluded from permitting under SMCRA. In that case, the court commented:

> "Implicit in Congress' thinking in enacting 30 U.S.C. § 1291(28) was that generally an operator is not required to permit a public road. . . .Obviously, Congress did not anticipate that operators would have to permit interstate highways or four-lane state routes nor that they would have to permit every road used to haul coal, whether four-lane or two-lane, state or county, paved or unpaved, or even public or private." Id.

Petitioners have provided no support for the proposition that transporting coal on a public highway located miles outside the actual mining area constitutes mining "operations." Rather, they attempt to advance an incorrect interpretation of the definition of "operations" to include transportation over public roads located outside the permit area. This interpretation stretches the definition beyond any logical boundaries, renders the definition of "adjacent areas" virtually meaningless and produces the absurd result of including all public roads anywhere upon which

[3] See Citizens Coal Council, 142 IBLA 33 (1997), finding that OSM properly concluded that a railroad and pipeline used to transport coal from surface coal mines to remote electrical generating stations were not "surface coal mining operations" under § 701(28)(B) SMCRA.

coal is hauled. This interpretation of "adjacent area" is over-broad and would potentially require that all roads and rail systems be permitted by every operating coal mine. Eastern Utah Broadcasting and Workers' Compensation Fund v. Labor Com'n, 2007 UT App 99, ¶ 10, 158 P.3d 1115, 1119 ("Our rules of statutory construction dictate that we interpret the statute so that each word has meaning"); State v. Jeffries, 2009 UT 57, ¶ 8, 217 P.3d 265, 268 ("To avoid an absurd result, we endeavor to discover the underlying legislative intent and interpret the statute accordingly.").

Petitioners' only stated basis for classifying the Panguitch District as part of the adjacent area comes from their claim that Alton's CRMP includes a "reasonably foreseeable transportation route" for the coal that goes through the Panguitch District. (Request, at 25.) However, Petitioners have improperly interpreted that statement and the accompanying map and have taken them out of their context and purpose. Alton's Application provides maps that identify the Panguitch District, and include a supporting narrative describing the District and explaining why it does not fall within the scope of the "adjacent area". This section was submitted to further clarify that the District clearly falls outside the "permit and adjacent areas" under the Utah Coal Program.

2. NEPA Analysis is Not Applicable to the State Mine Permit.

The CRMP was developed as a comprehensive document to address separate state and federal regulatory requirements, including BLM's requirements related to Alton's proposed lease of federal coal lands that are not part of the permitted area or the Utah Coal Program requirements for this Application.[4] The transportation route was included to help BLM analyze

[4] The CRMP explains: The Alton Coal Cultural Resource Management Plan (CRMP) is a new,

federal leasing requirements under the NEPA. 42 U.S.C.A. § 4321, et. seq. NEPA requires an environmental impact statement to address the "Affected Environment" as to "major federal actions significantly affecting the quality of the human environment." 42 U.S.C.A. § 4332 (2)(C).

The "Affected Environment" section of the CRMP addresses the study area for the separate LBA area as required by the NEPA process and is not part of the permit area that is the subject of Petitioners' Request. Placed within its proper context, it is clear that the CRMP does not acknowledge the "reasonably foreseeable transportation route" is part of the "affected area" of the Coal Hollow mine permit which is located exclusively on private lands.

3. Panguitch District and Highway US 89 Are Not Within the "Affected Area".

The mere inclusion within the Application of the maps and materials for the Panguitch District to address independent NEPA requirements regarding federal lands outside of the permit, does not result in the inclusion of the District within the "affected area" under the Utah Coal Program. The definition of "affected area" as found in the Utah Administrative Code expressly excludes roads such as Highway US 89, which passes through the Panguitch District:

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collaborative approach to state and federal undertaking with potential affects (sic) to cultural resources in the Alton Amphitheater and Sink Valley regions. . . .

The private and federal actions associated in the Alton Coal CRMP involve a number of state and federal agencies and must be compliant with a number of state and federal mandates. . . . All of the involved agencies . . . are aware that while the mine permit on public land and the proposed federal lease are not directly connected, these actions are related and therefore this document is a reference for UDOGM, the Utah State Historic Preservation Office (SHPO), and the Utah Public Lands Policy Coordination Office (PLPCO) for application to Utah Code 9-8-404, as well as for the BLM and UDOGM for application to Section 106 of the NRHP and NEPA."

Ex. B at 1 (emphasis added); The CRMP further states that: "The Environmental Impact Statement (EIS) that the BLM and SWCA Environmental Consultants are preparing for the federal coal lease application describes the foreseeable transportation route through the Historic District of Panguitch as a cumulative effect." (Id. at 20.)

> The affected area shall include every road used for purposes of access to, or for hauling coal to or from, coal mining and reclamation operations, unless the road (a) was designated as a public road pursuant to the laws of the jurisdiction in which it is located; (b) is maintained with public funds, and constructed, in a manner similar to other public roads of the same classification within the jurisdiction; and (c) there is substantial (more than incidental) public use.

U.A.C. R645-100-200 (emphasis added); see also definition of "public road" applying the same criteria, at Id.

US-89 is a federal highway that clearly meets the three criteria listed above, and is therefore exempted from the definition of "affected area" by the regulation. The Board can take official notice of this fact. Utah Admin. Code R641-108-204. However, due to uncertainty regarding the status of this state regulation,[5] Utah has adopted a policy regarding the exemption of public roads. This policy provides that a public road which was not constructed, reconstructed or used exclusively for coal mining and reclamation activities, i.e. a multiple use, open access public road may not be required to be permitted if: a) it is properly acquired by the governmental entity; b) is maintained with public funds or in exchange for taxes or fees; c) it was constructed in a manner similar to other public roads of the same classification; and d) impacts from mining are not significant under the definition of "affected area" and "surface coal mining operations. July 3, 1995 letter from Division Director James W. Carter to OSM. (Attached as Exhibit J.)

The Board followed this policy in finding that Emery County Road 126 accessing the Lila Canyon Mine is a public road that does not require permitting under the Utah Coal Program. SUWA v. Division, Cause No. C/007/0013, Board Findings of Fact, Conclusions of Law and

[5] See In Re: Permanent Surface Mining Regulation Litigation, 420 F.Supp. 1519 (D.D.C.) (remanding to OSM the 30 C.F.R. 701.5 "affected area" definition as to public roads.)

Order dated December 14, 2001 at page 19, attached as Exhibit K. By Order dated December 21, 2007, the Board denied SUWA's motion for temporary stay seeking to halt all construction activities related to Emery County's road improvements regarding Emery County Road 126. SUWA v. Division, Cause No. C/007/013, Order on SUWA's Motion for Stay, December 21, 2007 pp. 9-10, attached as Exhibit L. The Board ruled that SUWA was unlikely to succeed on the merits of its argument that Emery County's road should have been included within the permit area noting that the Board had rejected SUWA's claim in its December 14, 2001 Order. The Board also found that it lacked jurisdiction over Emery County and lacked authority to stop its construction activities. Id. In this case, the Board can take official notice that US Highway 89 clearly falls within the Division's public road policy and is not subject to regulation under the Utah Coal Program. Admin. Code R641-108-204. Further, the Division has no jurisdiction over the federal highway.

In sum, Petitioners' overbroad use of the terms "affected area," "adjacent area" and "coal mining and reclamation operations" is contrary to prior Board rulings, federal court precedent and Division policy. The analysis of the Panguitch District under NEPA is triggered by federal action independent from the mine permit application review undertaken by a state agency regarding operations on private land. In addition, the Division has no jurisdiction to regulate US Highway 89 under the Utah Coal Program. Petitioners' interpretation of the Utah Coal Program would lead to the absurd result of having to include every public roadway as part of an affected area that has no boundaries. By Petitioners' logic, if one ounce of coal is carried on the roads from the State of Utah to Maine, the entire interstate highway system could be deemed an "affected area" of the Coal Hollow Mine. The Division's jurisdiction under the Utah Coal

Mining and Reclamation Act does not extend to US Highway 89 or to the interstate highway system. This absurd and limitless construction of the Utah Coal Program should be denied by the Board and Petitioner's Request dismissed.

III. THE BOARD SHOULD DISMISS PETITIONERS' CLAIMS THAT THE APPLICATION LACKS NECESSARY INFORMATION REGARDING ALTERNATIVE SOURCES OF WATER AND WATER REPLACEMENT OBLIGATIONS.

Next, Petitioners argue that the Permit is deficient because Alton has "fail[ed] to quantify the likely or potential losses" of water supplies. (Request, at 23.) Petitioners further complain that "ACD fails to quantify the maximum expected production of water from the sole proposed replacement well it intends to use." (Request, at 24.) Petitioners' argument is unsupported by any citation to the rules, which simply require that the applicant provide "information" on water availability and suitability of alternative water sources. Utah Admin. Code R645-301-727.[6]

Alton has provided the requisite information on water availability and the suitability of alternative water sources. The Division has entered a finding determining that Alton's hydrologic resource information meets the Utah Coal Program requirements. (Final TA at 76-77.) In addition, Petitioners have overlooked Alton's findings set forth in the Permit Application:

> Using an unlikely worst-case scenario and assuming that all springs with state appropriated waters in both Areas A and B were to cease flowing, a total replacement of approximately 52 gpm would be required. The proposed new water well located in Section 29, Township 39 South, Range 5 West will be

[6] Utah Admin. Code R645-301-727: If the probable hydrologic consequences determination required by R645-301-728 indicates that the proposed SURFACE COAL MINING AND RECLAMATION ACTIVITY may proximately result in contamination, diminution, or interruption of an underground or surface source of water within the proposed permit or adjacent areas which is used for domestic, agricultural, industrial or other legitimate purpose, then the application will contain information on water availability and alternative water sources, including the suitability of alternative water sources for existing pre-mining uses and approved post-mining land uses.

> designed to produce water at that quantity and, therefore, should be able to provide adequate replacement water in even this worst-case scenario (which is not considered likely). Application at 7-22 and 7-23 (emphasis added).

Thus, Alton has addressed not only a worse-case scenario, but has indicated how water replacement will be effectuated in the unlikely event that the worst-case scenario should play out.[7]

Moreover, Utah law demonstrates that water replacement requirements become operative only after water supply has been adversely affected. In Castle Valley Spec. Serv. Dist. v. Bd. of Oil, Gas & Mining, the Utah Supreme Court determined that SMCRA's requirement under 30 U.S.C. § 1309a(a)(1) of replacing water sources affected by underground coal mining was inapplicable in a permit proceeding before the Division. 938 P.2d 248, 252-53 (Utah 1997). The Court construed the water replacement requirement to become operative only after a water user shows that their water supply has been affected by mining operations. Id. Although the Utah Supreme Court addresses this issue in the context of underground mining operations, a parallel provision of Utah law applies to surface operations. Utah Code Section 40-10-29 requires the operator of a surface coal mine to replace the water supply of real property owners when the owner can demonstrate that this supply "has been affected by contamination, diminution or interruption proximately resulting from the surface coal mine operation." As with underground operations, consistent with the ruling in Castle Valley Special Service

[7] See also, Application at 7-49: In the event that any State appropriated waters were to be contaminated, diminished, or interrupted due to mining and reclamation activities in the proposed Coal Hollow Mine permit area, groundwater will be replaced according to all applicable State laws and regulations using the replacement water source described in Section 727 above.

District, this water replacement requirement only applies after the property owner demonstrates that the water supply has been impacted by the proximate cause of surface coal mining operations.

Because Alton has provided the required information, and the Division is authorized by law to require nothing further, this claim should be dismissed as a matter of law.

IV. THE BOARD SHOULD DISMISS PETITIONERS' CLAIMS THAT THE APPLICATION'S AIR POLLUTION CONTROL PLAN IS DEFICIENT.

A. The Division Has Properly Conditioned the Mine Permit Upon Alton's Receipt of an Air Quality Approved Order.

The Board should dismiss Petitioners' claims that Alton's air pollution control plan is deficient. (Request, at 26-27.) The first of these claims appears to be that the Division could not have found Alton's Fugitive Dust Control Plan to be adequate because the Division is not qualified to evaluate EPA Method 9 proposed by Alton's monitoring plan. However, the applicable Utah Coal Program rules do not require the Division to issue air quality permits. Rather, the application is to "contain a description of coordination and compliance efforts which have been undertaken by the applicant with the Utah Bureau of Air Quality." R645-301-422. The Division's findings confirm that the Application describes Alton's compliance with the DAQ requirements for obtaining an Air Quality Approval Order. (Final TA at 85 referring to Application, Section 422 and Appx. 4-2.) Further, the Mine Permit itself is conditioned upon Alton's receipt of the Air Quality Approval Order from DAQ. In addition, the Division's findings acknowledge that Alton has provided a plan for fugitive dust control as required by R645-30-423 at Appx. 4-5 of the Application. (Final TA at 86.) However, because the Division

lacks expertise to assess EPA Method 9 under Alton's monitoring plan, the Division has properly deferred to Utah DAQ. (Final TA at 87.)

Pursuant to an MOU dated September 1, 1999, DAQ will evaluate the fugitive dust control plan prior to issuance of the air quality permit. Id. The Division's rules at R645-301-422 clearly contemplate this type of inter-agency coordination with the DAQ. The Division has conditioned the permit to require an approved Air Quality Approval Order before Alton can conduct surface coal mining operations. (Ex. A Permit, Attachment A, Special Conditions). Therefore, Petitioners' claims that the air pollution control plan is deficient are moot and should be dismissed.

B. The Utah Coal Program Does Not Require Applicant to Address the Quality of the Night Sky.

The second of the Petitioners' claims, related to the quality of the night sky in the National Park and Forest east of the permit area, is not rooted in a statute or rule that the Division is authorized to enforce. Petitioners allege that the Division explicitly required Alton to "explain the equipment for lighting the 24 hour operation and the effect on the night sky." (Request at 27.) The Petitioners' claims related to the "night sky" issue necessarily fail, because the Division does not have authority to require such analysis. The Application applies only to the area being permitted, which is comprised entirely of private lands and private coal leases. The night sky issue was originally raised in comments submitted by the Dixie National Forest in response to Alton's pending federal coal lease application.[8] The night sky issue is being analyzed by the BLM in conjunction with the draft environmental impact statement for the federal coal lease

[8] Alton Coal properly responded to the Division on this issue in a Memorandum attached as Exhibit 3 to its June 15, 2009 response to the Division's Technical Analysis.

application. Section 102(2)(C) of NEPA, 42 U.S.C. § 4321, et seq. requires an environmental analysis by federal agencies undertaking "major Federal action significantly affecting the quality of the human environment" (emphasis added). 42 U.S.C. § 4332. NEPA is not applicable to issuance of a State mine permit on private lands.

In summary, the "night sky" issue is only properly subject to analysis under the BLM's environmental impact statement being prepared for Alton's federal coal lease application. While the permit requires Alton to comply with applicable Utah Air Quality Standards, the Petitioners have not identified any provision of law permitting the Division to condition permit approval, or regulating Alton's performance under the permit, based on the darkness of the night sky. Because this allegation asks the Division to exceed its statutory authority, it should be dismissed.

CONCLUSION

For the foregoing reasons, Alton's motion for partial summary judgment should be granted, and the Board should dismiss Petitioners' claims that: (i) Alton failed to address road-kill issues or efforts regarding protection of the sage grouse and other wildlife in the Application; (ii) the Application's cultural/historic resource information was deficient; (iii) the Application lacks necessary information regarding alternative sources of water and water replacement; and (iv) the Application's air pollution control plan is deficient.

Respectfully submitted this 15th day of January, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **RESPONDENT ALTON COAL DEVELOPMENT, LLC'S MOTION AND MEMORANDUM IN SUPPORT OF PARTIAL SUMMARY JUDGMENT** was sent via email and U.S. Mail, postage prepaid, this 15th day of January, 2010, to the following:

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